No. 13,078

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

ROGER N. LIBBEY,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF THE CASE.

Appellee finds it necessary to augment, and in some particulars to correct, the statement of the case presented by appellant.

Plaintiff and appellee, Roger N. Libbey, applied to appellee Southern Pacific Company for the position of student fireman (R.46), was given a physical examination and approved and told to report for duty at appellee's railroad yard at Roseville, California where he was to act as a student fireman for two

weeks, and later if he qualified he was to go on the regular paylist (R.56). Appellee thereupon reported to the roundhouse foreman at Roseville who told him to keep his eyes and ears open and learn everything he could about being a fireman (R.57). He was also told to follow two engine fire lighters and learn to light engine fires. This he did in his first day's work (R. 57). Appellee was given by his foreman a document entitled "Authority to Pass and Instruct Student" (R.60) which provided that he be thoroughly instructed in the duties of the position named and requesting that he be "thoroughly acquainted * * * not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire" (R. 60). This form was signed by his foreman and stated: "engine or train, date from..... to ....., opinion as to fitness for position—learning."

On the second day of appellee's job as a student fireman on August 11, 1950, he was on the 3:59 P. M. to 11:59 P. M. shift after again reporting to his foreman who gave him no additional instruction (R. 61). On this day appellee worked with the fire lighters who were lighting fires on engines and by observing thus learned from the fire lighters, and during this time appellee lighted two fires on engines himself. When the fire lighters had finished their particular job they told appellee to stand around and watch and pick up whatever he could learn (R. 62). A hostler named Petersen then came along and advised appellee that he was going to move an engine and asked appellee if he would like to go with him (R. 63).

Appellee then got on an engine with Petersen with the purpose of trying to learn about the movement of the locomotive (R. 65). Appellee sat on the fireman's seat and watched the hostler, Petersen, move the engine. The door of the firebox of the engine was propped open in violation of the rules of the company at the time the hostler and appellee got on the engine. The hostler, however, negligently started the engine without closing the fire box door. When the engine moved a flashback of fire from the fire box caught the appellee while he was seated on the fireman's seat, burning the appellee's body and setting his clothes on fire. As the fire blocked appellee's way to the door of the engine cab, he jumped out the window of the cab and was severely and permanently injured (R. 66). Appellee sustained a compound, comminuted fracture of the right femur, with the fracture extending into the knee joint with a bowing of the femur (R. 126, 123, 128, 135). This injury has resulted in a permanent instability of appellee's right knee (R. 136, 137, 140). The uncontradicted medical testimony is that appellee permanently will be unable to engage in physical labor as a result of his accident (R. 138-140). Appellee's right knee is barely moveable (R. 126). He walks with a limp (R. 125) and has a shortening of his right leg (R. 136) and complains of pain while standing and walking (R. 139). These conditions are permanent (R. 140).

Appellee at the time of his injury was 27 years of age and had a life expectancy of 40.36 years (R. 211).

He quit school in his second year of high school (R. 78) and later engaged in jobs involving physical labor. Before his accident he made $300.00 a month while working on vessels for the United States Army Transport Service, later worked in lumber mills and as a laborer, and in his last job before this accident was a mechanic's helper at McClelland Air Field averaging about $190.00 a month (R. 104).

Appellee had injured his left leg by battle wounds while serving as a Marine in Guadalcanal, and again at sea several years before this accident, but was able to earn a living doing hard physical labor for several years before his railroad accident, and the condition of his left leg did not prevent him from working digging ditches and doing other hard physical labor. Appellee's Veteran's Disability Rating for the injury to his left leg had been cut down to 10% before his present injury (R. 169-170).

II.

ARGUMENT.

Appellant has assigned nine specifications of error which we shall discuss seriatim.

First, appellant contends that appellee was not an "employee" or engaged in interstate commerce within the meaning of the Federal Employer's Liability Act.

A. APPELLEE WAS AN EMPLOYEE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

The Supreme Court has held that the term "employee" in the Federal Employer's Liability Act describes the conventional relation of master and servant, and that this relation is usually dependent upon the right to control and direct the manner in which the work should be done.

Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 59 L. Ed. 849;

Hull v. Philadelphia & R.R. Co., 252 U.S. 475, 64 L. Ed. 670;

Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 60 L. Ed. 735.

Another criterion used by the courts in order to determine the status of employee is by ascertaining whose work was being performed at the time of the injury.

Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28, 72 L. Ed. 453.

The case of *Standard Oil Co. v. Anderson,* 212 U.S. 215, 53 L. Ed. 480, is a leading authority on this subject. In that case the court said:

> "The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct."

In the *Anderson* case the court observes that many of the cases discuss the power of substitution or discharge, the payment of wages, and other circum-

stances bearing upon the relationship, but rules they, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.

Several federal railroad decisions have recognized the rule announced in the authorities cited and hold that a servant or employee relationship results where a workman enters on a course of instruction with a railroad without compensation, and performs services including merely learning by observation as part of his instructions.

In the leading case on this subject, Judge Hulen, District Judge for the Eastern District of Missouri in the case of *Watkins v. Thompson* (1947) 72 F. Supp. 953, in a comprehensive decision has listed the leading cases in the nation on the subject of student employees under the Federal Employers' Liability Act. The *Watkins* case and the cases cited therein succinctly give the criteria as to what constitutes being an employee in the case of a student railroadman.

These criteria are:

1. The right of the railroad company to instruct the student as to how the work should be done.

2. The student's learning by observation which is held for the benefit of the railroad.

3. The railroad's expectation that the student would perform such tasks as were assigned to him by railroad employees.

4. That the student be subject to the orders and control of the railroad company.

In the *Watkins* case, supra, the plaintiff was a student yard clerk serving without compensation. Plaintiff was instructed to aid another employee in checking car numbers and seals. After finishing this work he went to a small house to get warm and then started walking through the railroad yard to continue checking. The student on his way back to work followed a yard clerk who went between cars of a train; the student followed. One issue of the case was what the yard clerk's instructions to plaintiff were about going through the train of cars. Plaintiff caught his foot on a coupler as the train moved and was thereby injured. The court held that the student was an employee under the Federal Employers' Liability Act as he was under the control and orders of the railroad company.

In *Huntzicher v. Ill. Central* (6 Cir. 1904) 129 F. 548, a student flagman was killed in a collision while sleeping in a caboose of a freight train after his active duties were done. The court held even though he was not actually working at the time of his death, still he was subject to the railroad's orders, even though his only duties were to learn by observation and to practice the duties of a flagman.

In *McMillan v. Grand Trunk R. Co.* (1 Cir. 1904) 130 F. 827 a student was told to watch couplings but not to go between cars. He did, however, go between cars and was injured. The court held that the student was an employee.

In *Rief v. Great Northern Ry.* (Minn. 1914) 148 N.W. 309, plaintiff, a student switchman, was not required by his contract to render any services yet the testimony showed that he was expected to perform and did perform, as part of his training, such tasks as were assigned to him by employees of defendant. The court held he was an employee.

In *Brown v. Chicago, R. I. & P. R. Co.* (Mo. 1926) 286 S.W. 45, 49, the court said:

> "Applying the foregoing test to the facts in the instant case, there can be little, if any, doubt that appellant retained the right to direct the manner in which deceased Brown should do the work assigned to him by the engineer and fireman who accompanied him."

The Supreme Court of California in *Weisser v. Southern Pac. Ry. Co.* (1906) 148 Cal. 426, held that a student brakeman who was entirely subject to the railroad's orders was an employee though he received no compensation.

In *Chesapeake & O. R. Co. v. Harmon's Adm'r* (Ky. 1916) 189 S.W. 1135, the court held that a student fireman who received no wages for his services and performed by virtue of a permit authorizing him to ride on the *engine only* was an employee while riding on the engine and entitled to a safe place to work.

The court said:

> "What the student fireman is receiving and what the railroad company is receiving in return

> is valuable. While the 'student' fireman is on the engine and performing the duties contemplated by the arrangement and within the scope of his duties under the arrangement, the railroad company certainly owes to him the same duties it owes to the regularly employed fireman of an engine in his employment."

The following cases have also held that student railroadmen without pay were employees.

Millsaps v. Louisville N. O. & T. Ry. Co. (Miss. 1891) 13 So. 696;

Haluptzok v. Railway Co. (Minn.) 57 N.W. 145;

Atchison, T. & S. F. R. Co. v. Frouk (Kan. 1906) 87 P. 698;

Findley v. Coal & Coke Ry. Co. (W. Va.) 87 S.E. 198.

Applying the uniform test enunciated in the foregoing cases to the facts in the instant case, there can be no doubt that appellant retained the right to direct the manner in which appellee should be occupied as a student fireman.

Appellee when he reported for duty at the railroad yard at Roseville was given a document entitled "Authority to Pass and Instruct Student" (Plaintiff's Exhibit 2—R.60), requiring him thoroughly to acquaint himself with the duties of his position, and the duties of any other position with which he may be entrusted or to which he may aspire. The position of fireman requires one to ride on engines and assist

the engineer. At Roseville the duties of hostler were conducted by firemen. Appellee's first assignment as a student fireman was to board engines and observe and help the fire lighters, as well as the general instruction to keep his eyes and ears open and learn all he could (R.57-62). Appellee lighted two fires himself (R.62) and later boarded the engine with hostler, or fireman (R.177), Petersen, at the latter's request, with the purpose of learning about the movement of the locomotive (R.65).

From the above it is obvious that appellee was acting in the scope of his employment as a student fireman, was working for the benefit of the railroad in learning by observation and incidentally assisted in the work himself by lighting fires, and was subject to the control of the appellant railroad company and subject to its orders and directions.

B. APPELLEE WAS ENGAGING IN THE FURTHERANCE OF INTERSTATE COMMERCE.

The testimony shows that appellee at the time of his injury was acting in the scope of his employment as a student fireman on appellant's Engine 2795, a consolidated switch and road engine (R.179). The testimony further shows that the engine was being taken at the time of appellee's accident from the roundhouse at Roseville to a preparatory track to be used that evening on a train called the Bowman Turn to pick up cars loaded with perishable fruits and vege-

tables to be returned to Roseville and then loaded into freight trains traveling in all directions throughout appellant's system, and thus going out of the State of California into other states (R.180-181-182-185-186).

The testimony further shows that appellee himself lit a fire on a mallet engine the day of his injury and also on a switch engine, and that the mallet engines are a bigger type that pull trains over the Sierras to Reno, in the State of Nevada (R.163).

The testimony in this case clearly showed that the Roseville yard of appellant is a central point on its line, where trains are broken up and made into other trains going into Nevada, Oregon and other points in interstate commerce (R.179).

In 1939 the Federal Employers' Liability Act (45 USCA 51) was amended to provide that any employee of a carrier any part of whose duties as such employee is in furtherance of interstate commerce or in any way directly, or closely and substantially, affects such commerce, was intended to include any employee who performs services which in any way furthers or affects interstate commerce, even if at the moment of injury he should not be engaged in interstate commerce. The actual wording of the broad and liberalizing 1939 amendment reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce as above set forth, shall, for the

purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Appellant in its brief cites a number of cases, all antedating the 1939 amendment and therefore not in point. Here we have a case where appellee was working at a central marshalling point on appellant's line where trains were broken up and remade to go out of the State of California into other states on the carrier's line. Appellee himself lit fires on engines, one of which we know to be a mountain mallet used to take trains over the mountains to Reno in the State of Nevada (R.178). Therefore, obviously, part of his duties was in the furtherance of interstate commerce and doing work closely affecting such commerce.

The following cases clearly demonstrate that the words "furtherance of interstate commerce" is elastic enough to embrace the situation in the case at bar.

Shelton v. Thompson (7 Cir. 1945) 148 F.2d 1, 3;

Edwards v. Baltimore & Ohio R. Co. (7 Cir.) 131 F.2d 366;

Kach v. Monessen Southwestern Ry. Co. (3 Cir.) 151 F.2d 400.

At least one of the engines, the mallet, on which appellee lit a fire, was used in interstate commerce. That is sufficient under the Act. In the *Shelton* case, supra, the plaintiff operated a crane in the railroad's storehouse lifting wheels of cars, some of which were

used in intrastate commerce and some in interstate commerce. However, no one knew where the wheel being lifted at the time of the accident would be used. The court held the movement as interstate, despite the fact that no witness could tell whether the wheel being lifted would be used on an interstate car, and that as some wheels obviously must be used in interstate commerce the court said:

> "Appellant argues that plaintiff, employed in the railroad's storehouse, operating a crane which hoisted car wheels into position for repair on freight trains, some of which were used in intra- and others in inter-state commerce, was not one who could conceivably be said to be engaged in interstate commerce.
>
> "However, we have before us, for construction, the amended act, not the original section. There can be no doubt but that the amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employment in '*furtherance* of interstate * * * commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic. It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the car so that it may thereafter be moved in interstate

(or by happenstance in intrastate) commerce, is engaged in an occupation 'in furtherance' of interstate commerce.

"A car cannot travel even in interstate commerce, without wheels. Ordinarily a car is as usable in interstate as in intrastate commerce. The same crane which plaintiff operated, moved many articles. Some were used on cars which moved in interstate commerce. No one in the employ knew where the car wheel would be used. Perhaps the success of the repair efforts would determine its future use.

"The report of the Senatorial Committee indicates that the amendment was intended to extend the application of the Federal Employers' Liability Act to employees, like plaintiff, who are engaged in work which left them and their attorneys in deepest doubt as to the law which governed their employers' liability and their right to recover damages for injuries which they might receive. The amendment was, we believe, a much needed one—and the selection of the phrase '*furtherance* of interstate * ** commerce' to accomplish the purpose of clarification, an effective and purposeful one."

The issue of interstate commerce was presented to the jury and determined by it.

C. APPELLEE WAS IN THE SCOPE OF HIS EMPLOYMENT WHEN ON THE ENGINE AT THE TIME OF HIS INJURY AND DID NOT DEVIATE FROM HIS DUTY.

Appellee will here answer appellant's specification of errors numbered 2, 3, and 4 as each of these specifications covers the same point, namely, appellant's contention that appellee at the time of his injury deviated from his employment and instructions when he boarded the engine with the hostler. Appellant contends there was a departure from the employment at the time of injury and that its proposed instructions No. 22 and No. 23 (R.26-27) on the question of deviation should have been given to the jury.

The court in refusing to give these two instructions correctly stated that there was no evidence in the case to warrant presenting a question of deviation to the jury. The court said:

> "I purposely did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement." (R.291).

There is absolutely no evidence warranting appellant's proposed instructions No. 22 and No. 23, and it would have been prejudicial error for the court to have given them to the jury. Let us examine these instructions. Appellant's proposed instruction No. 22 reads as follows:

> "Even if plaintiff is considered as having been employed by the defendant when he went upon the defendant's premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own benefit and convenience and his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company."

Appellant would have this court believe that the only instruction to appellee required him slavishly to follow the fire lighters even after the fire lighters' work had terminated, or for the appellant to then remain idle for the remaining hours of his shift. Actually, the instructions to appellee were both written and oral. The written instructions (R.60) required that he be *thoroughly* acquainted with the duties of a fireman and any other job to which appellee might aspire. The duties of a fireman require not only the lighting of fires on engines but to assist in the operation of a moving engine. On appellee's first day's work his general written instructions were augmented orally by the foreman when he told appellee to follow

the fire lighters and to keep his eyes and ears open and learn all he could about the duties of a fireman (R.57). This indeed was a broad charter thoroughly to learn the full duties of a student fireman.

On his second day of employment he received no instructions from the foreman, and again he followed the fire lighters, learning their duties by observation and then actually lighting two fires himself. He continued aiding them until the fire lighters finished their work when they told appellee to stand around and watch and pick up whatever he could learn (R.62).

Up to this point for two days appellee had done all his work in the cabs of various engines observing and lighting fires, and was then told all the engines had been fired and were ready (R.62). It was then before 10:30 p. m. and appellee's shift did not expire until 11:59 p. m. and he was told again to watch and pick up all he could learn. Remember appellee's written instructions had specifically ordered him thoroughly to become acquainted with the duties of a fireman, and that is exactly what he was doing when he went on the engine with the hostler. Counsel for appellant would have appellee, a student fireman, do nothing until the end of his shift rather than comply with his written instructions thoroughly to become acquainted with his duties as a fireman.

At the request of the hostler, Petersen, appellee boarded the engine with the hostler in order to observe and learn a fireman's duties on the engine. What a straining and laboring of fact and truth to contend

such action of appellee was a deviation or departure from the scope of his duties.

The proposed instruction would have informed the jury that if they found that appellee went upon the engine for his own benefit and in his own interest that he then had departed from the scope of his employment. Yet, there is not an iota of testimony that appellee went on the engine in his own interest, as he stated in his uncontradicted testimony that he boarded the engine with the hostler in order to learn something he hadn't learned before, including not only the firing but the operation of the engine (R.87). It is respectfully submitted that appellee's very job of student fireman required him to learn for the benefit of the railroad company, and that the very purpose of the railroad company appointing him as a student fireman embraced this concept.

The doctrine of the *Watkins* case (supra) enunciates this very rule. It, therefore, would have been error for the jury to speculate contrary to the uncontradicted evidence that appellee at the time of his injury was on the engine on an errand of his own.

Appellant's proposed instruction No. 23 would again have the jury determine contrary to the evidence the question whether the hostler's request to appellee was solely in order for appellee to observe the operation of the locomotive for his own benefit and also to determine the further question whether the hostler's request in any way modified earlier and

contrary instructions. There is absolutely no evidence of any contrary instructions to appellee. The oral instruction of the previous day to follow the fire lighters was only a partial instruction and embraced a specific request under the general comprehensive written instruction thoroughly to be acquainted with the duties of a fireman. The foreman orally told him *also* to learn all he could about his job. The evidence discloses that in Roseville the duties of hostler were conducted by firemen (R.177-178), and that the hostler Petersen had student firemen with him on the road on several engine trips (R.189). The testimony shows that as appellee had completed his two shifts with the fire lighters he was ready to start his road trips or yard trips in engines (R.188).

Petersen, the hostler, informed appellee that he was taking the locomotive out of the roundhouse in order to spot it on one of the tracks and asked appellee to come along. In order to observe and learn his job appellee did so. Where is there any deviation in doing what he was supposed to do on appellant's yard, namely, to learn by observation for the company's benefit? Under the broad written and verbal charter that he had received appellee had the right to learn everything he could about being a fireman. One of the things he had to learn was how to take an engine out of the roundhouse as a hostler and spot it and also to observe how an engine should be operated.

The additional vice of appellant's two proposed instructions is that they would have the jury believe

contrary to any evidence that appellee was forbidden to go on the engine.

Appellant's contention of deviation or departure from the scope of his employment is sustained neither from the facts nor the law he cites.

Appellant seems to lean heavily on the case of *Chesapeake & O. Ry. Co. v. Harmon's Adm'r* (Ky. 1916) 189 S.W. 1136, which counsel for appellant himself admits "is radically different on the facts concededly" (R.299). In that case a student fireman had a written permit allowing him to ride on engines of defendant railroad company. He worked on an engine assisting the engineer during a trip, but on a return trip went into the caboose of the train to rest and sleep contrary to orders of the train conductor who informed plaintiff he had no right to stay in the caboose. The engineer also sent word through the conductor to plaintiff in the caboose that he needed his assistance on the engine, but plaintiff flatly refused to go back to his duties. He was killed while sleeping in the caboose where he did not belong and where he was in willful violation of orders after refusing to do the duties assigned to him. The court therein said:

> "It is apparent that he could not perform any of the duties of his position while riding or sleeping in the caboose * * *. There is no sufficient reason shown why he was refusing to perform the duties expected of him, except his own pleasure, and since the evening before, he had not been engaged in the service of the appellant."

The court held against plaintiff in the *Harmon* case because of Harmon's direct refusal to work and his express refusal to leave the caboose when ordered out. Hence the facts of the *Harmon* case have absolutely no bearing on the case at bar.

Appellant also cites a number of workmen's compensation cases which hold that being injured while skylarking, at lunch, or on personal business is a deviation from the scope of one's employment. Frankly, appellee has no quarrel with appellant's cases on the subject of deviation or departure from duty as mere statements of law, but submits there is not the slightest applicability of the rulings in those cases to the facts herein.

The holding in the *Harmon* case, supra, was against the plaintiff only because he actively and willfully disobeyed positive orders and not because the student was in the caboose. This distinction is clearly drawn in the case of *Huntzicher v. Ill. Central Ry.* (6 Cir. 1904) 129 F. 548, where a student flagman was authorized to go on the road and there learn by observation and practice the duties of a flagman. He was killed, while asleep in the caboose, by a rear end collision. None of the student's duties required his presence in the caboose, but he had obtained the conductor's permission to rest there. The railroad company contended the student was not an employee at the time of his death because he was in the caboose. The court held the student an employee and said:

> "He was under the control of the defendant, and the company would undoubtedly have been

responsible for the manner in which he performed his service; and what is more important, under the test above stated he had no interest whatever, other than that which any servant has in the result of his service, in the consequence of the discharge of his duties."

There are several other cases involving student railroadmen holding them employees even where they were not actually performing their assigned work at the moment of their injury, as long as they were on the railroad company's yards and generally had been performing their duties as students.

Watkins v. Thompson (Mo. 1947) 72 F. Supp. 953;

Brown v. Chicago etc. R. Co. (Mo. 1926) 286 S.W. 45.

The facts in the case at bar are much stronger than even the *Watkins, Brown* and *Huntzicher* cases, supra, in that at the very moment of his injury appellee was performing his assigned duty of learning by observation the duties of a fireman on an engine. He was actually being instructed as a student fireman.

D. THE COURT PROPERLY EXCLUDED THE VOID CONTRACT AND IMMATERIAL RULES.

Appellee will here briefly discuss appellant's Specifications of Error Nos. 5, 6, 7 and 8. Specification No. 5 contends the Court should have admitted into evidence Rule 864 of the appellant's Rules and Regu-

lations of the Transportation Department, which reads:

> "Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect."

Appellee respectfully submits that even a casual perusal of the rule shows its immateriality. In effect the rule says that outsiders shall not ride on engines and cars without written authority and then the rule expressly excepts "employees in the discharge of their duties". If appellee is legally an employee then obviously the rule does not apply and the very issue determined by the jury was his employee status. The trial court observed that to contend the rule applied under the facts of *this case* would be a forced and unfair interpretation.

Appellant's Assignment of Error No. 6 refers to the Court's refusal to allow the introduction of a document printed on page 25 of the record, which document constitutes a waiver of liability by appellee and an express assumption of risk by appellee. This type of contract is against the policy of the law and is illegal and void under Section 5 of the Employers' Liability Act, and therefore its introduction was rightfully refused by the Court.

The issue presented to the jury herein was whether appellee was an "employee" under the Federal Em-

ployers' Liability Act at the time of his injury, and if the jury so found, as they did, such an agreement would be void. If the jury had determined appellee not to be an employee under the Act, appellee's case would have failed.

Section 5 of the Act reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *."
>
> 45 U.S.C.A. 55;
>
> *Philadelphia B. & W. R. Co. v. Schubert,* 224 U.S. 603 (56 L. Ed. 911);
>
> *Duncan v. Thompson,* 315 U.S. 1, 86 L. Ed. 575;
>
> *Rief v. Great Northern Ry.* (Minn. 1914) 148 N.W. 309.

Appellant's Assignment of Error No. 7 was an offer by appellant to introduce a fireman's agreement which appellant's counsel admitted was not by its terms applicable to appellee nor signed by appellee. The Court rightfully sustained the objection that an agreement not applicable to appellee would be incompetent, irrelevant and immaterial and self serving. The Court stated it would accept independent testimony as to appellee's status but not allow the introduction of an inapplicable contract.

Appellant's Specification of Error No. 8 contends the Court erred in rejecting appellant's question to Dr. Cress that if he had known of appellee's war

injury would he have permitted appellee to act as a student fireman? Appellant objected to this question on the grounds that the question called for a self-serving declaration on the part of the railroad company by its doctor and also that it was an attempt to impeach the doctor's own testimony that he had examined applicant and approved him for service with knowledge of his prior injuries and knowledge of his prior fracture. The Court thereupon made its ruling, saying:

> "Well. I think that this is not the field, Mr. Dunne, for expert testimony. The casual* (*causal*) relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining doctor; it would result in opinion and a conclusion which would be self serving and would decide the matter rather than leaving it as a question of fact. I will sustain the objection."

The record shows that the examining doctor, Dr. Cress, knew that appellee had had a compound fracture of his other or left leg prior to accepting appellee as physically fit for service as a student fireman (R. 263).

The issue as to any fraud or misrepresentation was put to the jury, as follows, in the Court's instructions (R.281):

> "There is another matter that you will have to determine in this case that affects the right of

*The Reporter used the word casual instead of causal in quoting from the judge's instructions.

the plaintiff to recover and that is the defense that was urged by defense counsel, namely, that this plaintiff misrepresented his physical condition and falsely stated it and the defense is that by virtue of that fact he is debarred from claiming the benefits of this statute.

Now, you should examine the evidence in that regard and (268) you should determine first whether or not the statements alleged to have been made by the plaintiff at the time he was examined were or were not false. If you determine that they were not false, then there is no need to pursue your inquiry any further, that defense will have failed. If, on the other hand, you determine that those statements made were false, then the next thing is to determine whether or not that caused any damage or change of position so far as the defendant was concerned, whether or not the defendant lost thereby the right to exercise the judgment as to whether or not the plaintiff should be employed or not. And you also have to further consider whether or not, even if that were so, whether or not there is any casual* (*causal*) connection between the nature of the false statement, if it be a false statement, and the accident itself. If there be no casual* (*causal*) relationship between the two, then of course it cannot be said that the defendant suffered any particular harm because of the false representation."

In this instruction the Court left it to the jury to determine if plaintiff had misrepresented his physi-

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cal condition, and that if he had, whether defendant was damaged thereby and whether there was any causal connection between any false statement, if any, and the accident itself.

It is submitted that the Court's instruction to the jury correctly followed the rule of law enunciated in the following cases, that fraud or misrepresentation in obtaining employment does not bar recovery under the Employers' Liability Act unless there be some causal connection between the misrepresentation and the accident, and furthermore that if a railroad company or its authorities have knowledge of the alleged misrepresentation before the accident, it is waived. The following cases hold the question of fraud is one for the jury:

Minn. etc. R. Co. v. Borum, 286 U.S. 447, 76 L. Ed. 1218;

Blanton v. Northern Pac. Ry. Co. (Minn.) 10 N.W. (2d) 382;

Kenny v. Union Railway Co. of N. Y., 152 N.Y.S. 117;

Hart v. New York C. & H. RR Co. (N.Y.) 98 N.E. 493;

Newkirk v. Los Angeles Junction Railway Co. (Calif.) 21 Cal. (2d) 308.

The verdict is not excessive.

Appellee, it is true, suffered a fractured left leg when wounded during the war, but he had recovered from that wound sufficiently so that he was receiving only a 10% disability rating. He was able for several

years, before his railroad accident, to earn his living by hard physical work making an average of $300 a month when in the Army Transport Service, and he averaged $190 a month during the half year before his railroad accident. At $300 a month the present value of his future earnings discounted at a 3% basis would be $82,800. The jury brought in a verdict of $50,000. The lower figure of $190 a month, which he earned as an airplane mechanic, discounted at the same 3% basis, would exceed the $50,000 verdict, to-wit: $52,440. Appellee's life expectancy at the time of his injury was 40.36 years.

The medical testimony is uncontroverted that appellee is permanently and totally disabled from ever engaging in physical labor.

The present value of his future earnings exceed the verdict without considering general damages for appellee's pain and suffering.

A motion for a new trial, including the ground of alleged excessiveness of the verdict and covering as grounds all other points raised by this appeal, was denied.

There is no abuse of legal discretion by the trial judge in denying the motion for a new trial, nor is there evidence of passion or prejudice in the record. Appellee submits that the verdict is not monstrous in the circumstances.

Affolder v. N. Y. Chi. & St. L. Ry. Co., 339 U.S. 96, 94 L. Ed. 683;

Southern Pacific v. Guthrie, 180 F. (2d) 295, 303;

Southern Pacific v. Guthrie, 186 F. (2d) 926 (rehearing).

Appellee respectfully submits that the judgment below should be affirmed.

Dated, San Francisco, California,
December 14, 1951.

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